

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALFORD WINGFIELD,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 251353
Calhoun Circuit Court
LC No. 2002-004919-FC

Before: Markey, P.J., and Murphy and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a jury trial, of second-degree murder, MCL 750.317. He was sentenced to 30 to 50 years’ imprisonment. We affirm.

Defendant’s conviction is the result of his arrest and trial for the 1982 death of Cheri Ann Edwards, after the case was reopened in 2003 by the Michigan State Police Cold Case Task Force. Edwards was fifteen years old when she was killed in July of 1982. Her body was found in a ditch along ‘N’ Drive West in rural Burlington Township. She lived with defendant at his establishment, the Playpen, and had a relationship with him. Testimony indicated that defendant was a pimp and had a history of violence toward women.

Defendant argues that he is entitled to a new trial because no African-Americans were present in the jury venire. We disagree. We review questions concerning the systematic exclusion of minorities in jury venires de novo. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

While a criminal defendant is entitled to an impartial jury that is drawn from a fair cross-section of the community, he is not entitled to a jury that mirrors the community and each of its distinctive population groups. *Id.*, citing *Taylor v Louisiana*, 419 US 522, 530; 95 S Ct 692; 42 L Ed 2d 690 (1975). To establish a prima facie violation of the fair-cross-section requirement, a defendant must satisfy a three-prong test, showing “(1) that the group alleged to be excluded is a ‘distinctive’ group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.” *Hubbard, supra* at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

Defendant has satisfied the first prong of the *Duren* test, because “African-Americans are considered a constitutionally cognizable group for Sixth Amendment fair-cross-section purposes.” *Hubbard, supra* at 473.

Defendant argues that the second prong is satisfied because African-Americans were substantially underrepresented in the jury pool. “Merely showing one case of alleged underrepresentation does not rise to a ‘general’ underrepresentation that is required for establishing a prima facie case.” *People v Howard*, 226 Mich App 528, 533; 575 NW2d 16 (1997). Defendant presents no evidence of underrepresentation on a broader scale, or in general, with respect to Calhoun County jury venires, and, hence, has not met his burden on this prong of the *Duren* test. *Id.*

Likewise, defendant has not satisfied the third prong of the *Duren* test, which requires him to show that systematic exclusion caused the underrepresentation. *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). Defendant argues that selecting names from lists satisfies this prong because the trial court did not indicate that it was random, but he offers no evidence showing the systematic exclusion of African-Americans from Calhoun County jury venires. Defendant argues that systematic exclusion is a recurring problem, but provides no evidentiary support. Defendant fails to show that a problem inherent in the selection process resulted in systematic exclusion. *Id.* at 527. Defendant fails to carry his burden and is not entitled to a new trial.

Defendant next argues that he is entitled to resentencing because his sentence of 30 to 50 years’ imprisonment violates the rule of proportionality. We disagree. We review issues of sentence proportionality for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 653-654; 461 NW2d 1 (1990).

In 1983, our Supreme Court expanded the power of this Court to review, pursuant to an abuse of discretion standard, a trial court’s imposition of a sentence, and the review focused on whether the sentence shocked the conscience of the appellate court. *People v Coles*, 417 Mich 523, 550-551; 339 NW2d 440 (1983), overruled in part, *Milbourn, supra*. The *Coles* Court noted the prior status of the law regarding sentencing review:

It is thus clear that appellate review of sentences to date has included both the procedural consideration of how the defendant was sentenced as well as a consideration of whether the substance of the sentence was statutorily or constitutionally permissible. What is now at issue is whether we should more clearly expand the scope of appellate review to include a review of the trial court’s exercise of discretion in sentencing a defendant when the sentence falls within statutory limits which do not constitute cruel or unusual punishment, when the sentence does not violate the rule established in [*People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972) – two-thirds rule], when the trial court has not relied upon impermissible considerations, and when the court rules relating to sentencing procedures were properly followed. [*Coles, supra* at 532.]

In 1990, our Supreme Court rejected the “shock the conscience” standard set forth in *Coles* in favor of a proportionality analysis weighing the sentence imposed and the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra* at 636, 650-654.

A sentence that violates the principle of proportionality constitutes an abuse of discretion. *Id.* at 636. The offense committed here occurred in 1982, before *Coles* and *Milbourn* were decided, begging the question regarding the appropriate sentencing principles to be applied. *Milbourn* decreed that the doctrine of proportionality applied, in part, to “appeals filed after the date of this decision.” *Milbourn*, *supra* at 669-670. Hence, the rule of proportionality is applicable here. Our Supreme Court in *People v Babcock*, 469 Mich 247, 261-262; 666 NW2d 231 (2003), ruled that proportionality remains relevant with respect to a court’s decision to depart from the guidelines, but not as to sentences within the guidelines. Here, the legislative or statutory guidelines are not implicated because the murder took place before January 1, 1999. MCL 769.34(1) & (2).

A trial court may consider many factors when imposing a sentence, including the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant’s attitude toward his criminal behavior, the defendant’s social and personal history, the defendant’s criminal history, including subsequent offenses, and the effect of the crime on the victim. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000).

Here, the trial court considered the circumstances surrounding Edwards’ death: her age, her vulnerability, the brutal nature of the crime, and her relationship with defendant, as well as defendant’s position of power and his overall pattern of violence towards women. The court properly considered these circumstances. We find the sentence to be proportional in light of the circumstances of the offender and the offense.

Defendant also argues that, because the crime was committed in 1982, the legislative guidelines do not apply; however, judicial sentencing guidelines were in place, and although not yet mandatory, any departure from the recommended range required articulation of substantial and compelling reasons that were objective and verifiable.¹ Defendant then references a minimum sentencing range of 162 to 270 months. These numbers are found in the PSIR, in which it is noted that the sentencing guidelines do not apply, and which states, “A non-binding tabulation, based on current Guidelines, provides a score of 162 to 270 months.” Therefore, the 162 to 270 month range mentioned by defendant arises out of the current legislative sentencing guidelines, which, as noted above, are not applicable. Regarding the early history of the judicial sentencing guidelines, in 1983, the Supreme Court crafted guidelines and promulgated these guidelines pursuant to Administrative Order No. 1983-3, 417 Mich cxxi (1983). *Babcock*, *supra* at 254. Under that order, beginning on May 1, 1983, judges were invited to use the guidelines, but the order did not require them to do so. AO 1983-3; *People v Potts*, 436 Mich 295, 298; 461 NW2d 647 (1990). The judicial sentencing guidelines became mandatory pursuant to Administrative Order No. 1984-1, 418 Mich lxxx (1984), commencing on March 1, 1984. See

¹ At sentencing, defendant did not challenge the trial court’s failure to use any sentencing guidelines; therefore, we review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Arguably, the issue was also waived, where defense counsel affirmatively indicated that he had no exceptions or corrections in regard to the PSIR, and where the PSIR provided that sentencing guidelines were not applicable. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Potts, supra at 298-299. There were no guidelines in place, mandatory or optional, in 1982. Defendant argues that had he “been charged and convicted in 1982 and appealed, the judicial guidelines promulgated in 1983 would have been in effect.” AO 1983-3 provided that use of the guidelines was not required, and it further provided:

These judges [who choose to use the guidelines] are urged to complete the sentencing forms to be provided by the staff of the committee and, in each case in which a minimum sentence outside the recommended minimum range is imposed, to explain on the form what aspects of the case at bar or of the guidelines have persuaded the judge to impose a sentence outside the recommended minimum range. The committee shall periodically analyze the data contained in these forms and shall provide an evaluation of such data to the Court. At the conclusion of the year, the committee shall make a final report to the Court of its findings and conclusions.

Here, the trial court did not utilize sentencing guidelines and would not have been required to do so under AO 1983-3. If the court was not required to use the guidelines in the first place, it would be nonsensical to conclude that the court had to articulate reasons for a departure from the guidelines. Moreover, even had the court utilized the 1983 judicial sentencing guidelines, AO 1983-3 makes abundantly clear that providing reasons for departure was merely a tool to be used by the Supreme Court in evaluating the soundness of the guidelines, and not a basis for appellate reversal where no articulation occurred. Furthermore, the lower court record reflects that defendant is a second-habitual offender, MCL 769.10, and the judicial sentencing guidelines did not apply to the sentencing of habitual offenders. *People v Hansford (After Remand)*, 454 Mich 320, 323; 562 NW2d 460 (1997). There was no plain error in the court’s failure to apply sentencing guidelines, and thus there could be no error relative to defendant’s assertion that the court failed to articulate a reason for the so-called “departure” from the guidelines. Defendant failed below, and fails on appeal, to present any additional argument or analysis regarding whether the judicial sentencing guidelines apply; therefore, we shall not explore the matter any further.

Defendant’s final argument is that he was denied effective assistance of counsel because defense counsel failed to (1) hire an investigator, (2) notify the prosecutor of proposed defense witnesses, and (3) request assistance from the prosecutor in locating witnesses. We disagree. Because there was no evidentiary hearing or motion for a new trial before the trial court, our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law that are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court outlined the basic principles behind a claim of ineffective assistance of counsel:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797

(1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that defense counsel was ineffective because he failed to hire a private investigator to locate witnesses, which resulted in the failure to call witnesses whose testimony would have created a great probability of a different outcome. On June 9, 2003, defense counsel requested an adjournment because he needed more time to hire a private investigator. The trial court denied the motion because funds for an investigator had been granted almost three weeks earlier. Defendant contends that competent counsel would have hired an investigator and pursued potential witnesses. Defendant also contends that certain witnesses should have been located: Evelyn Porter, to confirm or deny Barbara Riley’s testimony that defendant admitted to killing Edwards; Diane Lopez; and a woman known only as Jeanette, with whom defendant claims he spent the night of July 24, 1982. Defendant also argues that defense counsel failed to notify the prosecutor of the defense witnesses he wished to call at trial.

This Court will neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor will it evaluate counsel’s competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). However, the mere fact of a decision being one of strategy does not insulate defense counsel’s actions from scrutiny. A defendant “must overcome the presumption that a challenged action might be considered sound trial strategy.” *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). A reviewing court should inspect the challenged action to determine whether it was a sound strategic decision. See *id.* at 17-19.

Even if defense counsel’s failure to hire an investigator was deficient, we are not convinced that this failure was outcome determinative. Porter’s testimony could have been helpful or hurtful, and that of Davis and Jeanette about defendant’s whereabouts has little bearing, given the testimony of six witnesses that saw defendant with Edwards on July 25 or 26, 1982. Defendant does not indicate how other witnesses would have testified at trial and has not overcome the presumption of effective assistance of counsel. Defendant’s argument is much too speculative.

Further, the failure to hire an investigator is inextricably intertwined with the failure to call witnesses. The decision to call witnesses is presumed to be a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses or present other evidence constitutes ineffective assistance if it deprives the defendant of a substantial defense, which might have made a difference in the outcome of trial. *Id.* Because

defendant fails to indicate the substance of the potential testimony of these witnesses, we cannot conclude that it would have been outcome determinative. Prejudice has not been established.

Defendant also argues that defense counsel failed to request the prosecution's assistance in locating the witnesses lacking contact information, as provided for by MCL 767.40a(5). Defendant contends that had such assistance been obtained, many witnesses could have been located, and a more comprehensive investigation than that performed by the prosecution would have located more witnesses. Defendant has mischaracterized the prosecution's efforts in locating his witnesses. The prosecutor indicated that his investigators had located two witnesses and detailed efforts made to locate others. We fail to see how the prosecution's efforts would have differed had defense counsel requested assistance; therefore, this argument fails. Based on the record, defendant has not overcome the presumption of effective assistance of counsel and fails to establish prejudice.

Affirmed.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Peter D. O'Connell